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IN THE
Supreme Court Of The United States
October Term, 1997

MARLENA RAMALLO,

Petitioner,

vs.

JANET RENO, in her official capacity
and
DORIS MEISSNER, in her official capacity,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

REPLY BRIEF FOR THE PETITIONER

Richard L. Brusca
Counsel of Record
Katharine S. Sexton
Benjamin B. Klubes
Catharine A. Hartzenbusch
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000

Attorneys for the Petitioner Marlena Ramallo

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INTRODUCTION

Respondents readily concede that the decision of the District of Columbia Circuit below conflicts with the Ninth Circuit decision in *American-Arab Anti-Discrimination Committee v. Reno*, 119 F.3d 1367 (9th Cir. 1997), *petition for cert. filed*, __U.S.L.W.__ (U.S. Jan. 30, 1998) (No. 97-1252) ("*American-Arab*"). (Resp'ts Br. in Opp'n at 9-10.)[1] Respondents also admit that whether the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA")

[1] Petitioner cites to the printed version of the Brief for the Respondents, served on February 4, 1998.

impermissibly bars federal court jurisdiction to redress constitutional claims presents an issue warranting Supreme Court review. *Id.* Petitioner wholeheartedly agrees.

Respondents, however, make the rather curious suggestion that this case, which was decided well before the Ninth Circuit denied rehearing in *American-Arab*, should be held in abeyance until Respondents' petition for certiorari in *American-Arab* is resolved. According to the government, *American-Arab* is somehow a "better vehicle" for this Court's consideration of the matters at issue here. (Resp'ts Br. in Opp'n at 11.)

No doubt, Respondents would prefer to present their arguments to this Court against the factual backdrop of *American-Arab*, rather than of this case. After all, *American-Arab* presents the unsympathetic scenario of the government being prevented from deporting alleged terrorists. This case, on the other hand, involves the government's efforts to deport an individual (i) who made an agreement with the government; (ii) who fully cooperated with federal law enforcement authorities in accordance with that agreement; (iii) whose testimony was responsible for the conviction of over 30 dangerous South American drug felons; and (iv) who is likely to be killed if she were deported because of her cooperation and testimony. (Pet. at 4-5.) The government's preference notwithstanding, Ms. Ramallo's petition presents an ideal "vehicle" for this Court to consider the issues raised herein as well as in *American-Arab*.

Furthermore, whether persons, citizen or alien, can rely upon the United States to live up to its agreements with witnesses who provide life-threatening cooperation and testimony in criminal prosecutions is a recurring issue of importance which, Petitioner submits, has more far-reaching implications than the limited factual scenario at issue in *American-Arab*.

Finally, because the respondents in *American-Arab* prevailed before the Ninth Circuit, the likelihood of their supporting the government's petition for certiorari in that case

is remote at best. Here, however, both Petitioner and Respondents *agree* that this Court should review the matters at issue. As a consequence, Petitioner Marlena Ramallo respectfully submits that this Court should grant her petition.[2]

DISCUSSION

A. The Decision Below Conflicts With American-Arab And Is Worthy Of Review.

Respondents clearly and directly agree with Petitioner that this case presents a conflict in the circuits regarding important statutory and constitutional issues. Review of this case is warranted notwithstanding Respondents' eleventh-hour "clarification" of its view on the availability of appellate court habeas corpus review of the constitutional claims of aliens facing deportation. Respondents state that their *current* position on the availability of the writ of habeas corpus with respect to matters arising under the Immigration and Nationality Act ("INA") is that (i) generally it is unavailable; (ii) courts of appeal can, however, hear any substantial constitutional claims pursuant to a petition to review a deportation order; and (iii) any need for development of unresolved facts bearing on a constitutional claim can be referred to a district court for a hearing pursuant to 28 U.S.C. § 2347(b)(3). (Resp'ts Br. in Opp'n at 8 n.6.)

Despite what the government might now contend, however, it is far from certain that the courts ultimately will accept that view. First, it is only the most recent position espoused by Respondents, and, as such, there is no guarantee it will remain their position. Furthermore, no court has adopted this position under the amended INA and there is no reason to believe any court will. To the contrary, at least one federal court, the Ninth Circuit in *American-Arab*, has expressly rejected Respondents' new view of the law.

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[2] Of course, should the Court desire, it can consolidate for argument *American-Arab* or any other case raising issues similar to those raised in this case.

American-Arab, 119 F.3d at 1373 (holding that because the INA limits appellate review to the administrative record, the statute precludes resort to the Section 2347(b) procedure).

More to the point, Respondents' suggestion as to the appropriate procedures for habeas review -- referral to a district court for the taking of additional evidence -- is, in essence, precisely what occurred in this case. Indeed, Respondents note that Ms. Ramallo's petition for review in the Fourth Circuit has been held in abeyance pending the resolution of this case, which was brought in the District Court for the District of Columbia. (Resp'ts Br. in Opp'n at 5.) The Fourth Circuit stayed its proceeding until the district court could conclude its proceeding to develop the factual basis for Ms. Ramallo's constitutional claim. To require the Fourth Circuit to refer the matter to yet *another* district court would entail a gross waste of judicial resources by necessitating that the entire district court proceeding be repeated. That result should not obtain.[3]

B. The Retroactivity Of Section 242(g) Of The INA Remains In Dispute.

Respondents argue that Section 306(c)(1) of the IIRIRA, amending Section 242(g) of the INA (codified at 8 U.S.C. § 1252(g)) applies to pending cases to bar federal court jurisdiction. (Resp'ts Br. in Opp'n at 17-18.) Respondents are incorrect.

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[3] Despite the district court's clear finding to the contrary *Ramallo v. Reno*, 934 F. Supp. 1, 2 (D.D.C. 1996) (Pet. App. at 57), Respondents continue to present their view of the agreement with Ms. Ramallo as follows: "[T]he government agreed to allow petitioner to stay in the country *while she cooperated*." (Resp'ts Br. in Opp'n at 3) (emphasis added). Such a position defies all notions of common sense, and the district court so found. *Ramallo v. Reno*, 934 F. Supp. at 1 (Pet. App. at 58). Ms. Ramallo also takes issue with a number of Respondents' other contentions in their statement of the case. (Resp'ts Br. in Opp'n at 2-8.) Because consideration of these inaccuracies is not necessary for this Court's resolution of the petition, Petitioner will not refute them here.

As an initial matter, that provision could not have barred the district court's jurisdiction in this case because it was not even enacted when that lower court issued its final injunction against the government.[4] It also could not bar the appeal to the D.C. Circuit, not only because the provision was not in effect at the time the appeal was filed, but also because it was the *government*, not Ms. Ramallo, who took that appeal. Thus, under the plain language of Section 242(g), the appeal was not "by or on behalf" of Ms. Ramallo.[5]

Respondents rely on *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) to support the decision of the court below. But *Landgraf* itself holds that absent a clear expression of intent, the presumption against applying statutes retroactively requires that it not be used to vitiate valid orders entered by the courts below. *See Landgraf*, 511 U.S. at 280.

This case also provides this Court with a perfect opportunity to explain further its decision in *Landgraf*. Using Section 306(c) as the sole justification for vacating a lower court decision -- which decision was rendered before the statute was passed -- clearly would be retroactive. As Justice Scalia explained in his concurring opinion in *Landgraf*, "applying a jurisdiction-eliminating statute *to undo past*

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[4] Furthermore, Ms. Ramallo could have pressed her claims even before Respondents attempted to deport her to Bolivia, thereby dispatching her to her death. Contrary to Respondents' assertion, Ms. Ramallo's claims do not arise from the decision of the Attorney General to execute the deportation order against her. (Resp'ts Br. in Opp'n at 12 n.9.) Rather, her claims arise from the government's breach of the agreement, which includes, but is by no means limited to, the Attorney General's decision to deport Ms. Ramallo and not to restore her to lawful permanent residence status.

[5] Section 242(g) of the INA, as amended, provides:

> Except as provided in this section and notwithstanding any other provision of law, no court shall have jurisdiction to hear any cause or claim *by or on behalf* of any alien arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under [the INA].

(Pet. App. at 85) (emphasis added).

judicial action would be applying it retroactively; but applying it to prevent any judicial action after the statute takes effect is applying it prospectively." *Landgraf*, 511 U.S. at 293 (Scalia, J., concurring in judgment) (emphasis added). Here, the circuit court not only applied the statute "prospectively," by finding against its own jurisdiction, but also used it retroactively -- as the only basis for vacating (or "undoing") the injunction issued by the district court. The latter course was improper.

The inconsistent provisions of the IIRIRA regarding its effect on pending cases render congressional intent to revoke jurisdiction, at best, ambiguous.[6] The presumption against retroactivity requires that this statute not be construed to invalidate the district court's order, because the IIRIRA did not expressly state that it is intended to have the retroactive effect of "undo[ing] past judicial action."

C. The Appropriateness Of The Vacatur Of The District Court Decision Independently Warrants Review.

Respondents fail to provide adequate support for the D.C. Circuit's decision to vacate the district court judgment. Significantly, *Auguste v. Reno*, 118 F.3d 723 (11th Cir. 1997), the only case cited by Respondents to justify the specific action taken by the D.C. Circuit here, itself merely cites, without analysis, to the D.C. Circuit's decision in this case. Such a circular citation to authority demonstrates that little, if any, authority supports the D.C. Circuit's decision vacating the district court judgment.

The cases cited by Respondents are not apt. To the contrary, they only stand for the unremarkable proposition

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[6] *Compare* IIRIRA § 306(c)(1) (Pet. App. at 85-86) (stating that the new exclusive jurisdiction provision replacing the repealed 8 U.S.C. 1105(a) shall apply to claims arising from pending deportation proceedings) *with* IIRIRA § 309(c)(1) (Pet. App. at 87) (stating that the amended statute does not apply as a general rule to pending deportation proceedings).

that appellate courts must vacate decrees or judgments of lower courts that *never had* subject matter jurisdiction. *The Assessors v. Osbornes*, 76 U.S. (9 Wall.) 567, 575 (1869) (holding that where a trial court never had jurisdiction, an improperly rendered judgment must be reversed by an appellate court); *Gully v. Interstate Natural Gas Co.*, 292 U.S. 16, 18-19 (1934) (same); *Mansfield, C. & L.M. Ry. Co. v. Swan*, 111 U.S. 379, 385-86 (1884) (same). Here, however, the circuit court specifically held that it did not reach the issue of district court jurisdiction. *Ramallo v. Reno*, 114 F.3d 1210, 1213 (D.C. Cir. 1997) (Pet. App. at 5). Rather, the circuit court vacated the injunction because it found that *it* did not have jurisdiction to review the district court's injunction. *Id.* at 1213-14. (Pet. App. at 6-7.) Accordingly, the cases cited by Respondents do not provide authority for the D.C. Circuit's vacating the district court judgment in this case.

The statutory provision cited by Respondents, 28 U.S.C. § 2106, begs the question. It simply speaks to the general powers of an appellate court, and not to the appropriate circumstances under which to exercise such powers. Obviously, it does not authorize the circuit court *improperly* to vacate district court judgments. The government knew how to ask for a district court judgment to be vacated, as demonstrated by the government's request in *American-Arab*,[7] but it did not do so here. Instead, the D.C. Circuit issued that relief, *sua sponte*, and in error.

Finally, the government makes a valiant, yet unpersuasive, effort to support the circuit court's "mootness analogy" to justify the vacatur of a presumptively valid district court injunction. The difficulty Respondents face, however, is that this case is not even remotely moot. The IIRIRA does not -- and indeed cannot -- affect Article III jurisdiction by removing statutory jurisdiction from the

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[7] *See American-Arab*, Petition for Certiorari, No. 97-1252 (filed Jan. 30, 1998) at 9 (describing government's request that circuit court vacate district court decision).

courts. Thus, even if the IIRIRA did divest the courts of appeal of statutory jurisdiction, there is no Article III basis to vacate the district court's order.[8]

At bottom, it defies reason to argue, as Respondents do, that the government should be handed a victory and the district court's order summarily should be nullified "to prevent the district court's order from escaping appellate review." (Resp'ts Br. in Opp'n at 18.) To so assert would be akin to a challenger being awarded the heavyweight title because the referee could not make it to the fight. This Court should not endorse such an absurd and inequitable result.

The petition should be granted.

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[8] Even if this Court were to accept the mootness characterization, vacatur still would not necessarily be warranted. *See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18, 24-25 & n.3 (1994) (suggesting that mootness does not require equitable vacatur where the party seeking relief from the judgment below caused the mootness by voluntary action -- which could include enactment of legislation where the government is a party). Here, the alleged "cause" of the "mootness" was the government's enactment of the IIRIRA. Respondents should not be permitted to disavow responsibility for that legislation and simultaneously take advantage of its jurisdictional provisions.

CONCLUSION

For the foregoing reasons, and for the reasons stated in Ms. Ramallo's petition, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Richard L. Brusca
Counsel of Record
Katharine S. Sexton
Benjamin B. Klubes
Catharine A. Hartzenbusch
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM LLP
1440 New York Avenue, N.W.
Washington, D.C. 20005
(202) 371-7000

Attorneys for the Petitioner Marlena Ramallo

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